DOCUMENT RESUME

ED 071 115 CS 500 090

AUTHOR Forston, Robert F.
TITLE How Communication Theory Could Be Used to Improve Judicial Decisions on Freedom of Expression.
PUB DATE Nov 72
NOTE 10p.; Paper presented at the Western Speech Communication Assn. Convention (Honolulu, November 1972)

EDRS PRICE MF-$0.65 HC-$3.29
DESCRIPTORS Civil Disobedience; *Civil Liberties; Demonstrations (Civil); *Freedom of Speech; *Game Theory; *Information Theory; *Nonverbal Communication; Supreme Court Litigation; Symbolic Language

ABSTRACT

The author considers the current position of the Supreme Court on the First Amendment and the right of free speech. There are questions of distinction between what constitutes lawful or unlawful expressions of opinion, including the use of symbolic conduct, with respect to the communicator's intent, his effectiveness, and the clear and present danger of the act. The author proposes use of a communications game theory to assist in distinguishing between lawful and lawless communication. Using sports events as analogies, he discusses rules, tactics, and customs and their functions in games. He concludes that this game model could serve as a "unique, flexible perspective" for analysis of communication situations, particularly in making decisions about protection under the First Amendment and violations of free speech. (RN)

ED 071115

U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
OFFICE OF EDUCATION
THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL OFFICE OF EDUCATION POSITION OR POLICY

HOW COMMUNICATION THEORY COULD BE USED TO IMPROVE JUDICIAL DECISIONS ON FREEDOM OF EXPRESSION

Robert F. Forston

Drake University

PERMISSION TO REPRODUCE THIS COPYRIGHTED MATERIAL HAS BEEN GRANTED BY
Robert F. Forston

TO ERIC AND ORGANIZATIONS OPERATING UNDER AGREEMENTS WITH THE U.S. OFFICE OF EDUCATION FURTHER REPRODUCTION OUTSIDE THE ERIC SYSTEM REQUIRES PERMISSION OF THE COPYRIGHT OWNER

Presented Before the Western Speech Communication Association Convention, Honolulu, Hawaii, November 20, 1972

CS 500 090

I

Freedom of expression has been important from the very inception of our republic. The Boston Tea Party and the patriotic protests by our forefathers have been enshrined in our history. The right to dissent was considered so important that it was guaranteed in the First Amendment.[1] This guarantee of freedom to communicate one's grievances was extended to the individual states of the union by the Fourteenth Amendment.[2] "Freedom of speech" has also been construed to apply to more than verbal expression; thus various forms of symbolic conduct and nonverbal expression are constitutionally protected.[3]

The current approach of the Supreme Court, however, is to separate expressive activities into speech and nonspeech (nonverbal) elements. For example, the court has proclaimed: "We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on the streets and highways, as these amendments afford to those who communicate ideas by pure speech."[4] Since a number of communication theorists argue for the need for a more integrated analysis of verbal and nonverbal communication and since others find it difficult to separate the nonverbal vocal qualities which accompany the spoken words, this separation by the Supreme Court will probably create some definite problems. One prominent legal scholar, Harry Kalven, Jr., also makes a critical observation of the courts' separation of speech and nonspeech elements: "[A]ll speech is necessarily 'speech

plus.' If it is noise, it may interrupt someone else; if it is written, it may litter."[5]

Another reason that symbolic conduct (nonspeech) should be granted equal protection under the Constitution is to afford more members of our society to be able to express themselves in the most effective legal means possible.[6] Most often, those who are tried in civil cases are members of various dissenting minorities. In many instances, these people are not as verbally skilled as the majority public, nor do they have ready access to the media. Their most expressive mode of communication is frequently symbolic conduct. Martin Luther King's words probably would not have received the coverage it did without the extensive use of symbolic behavior, such as marches, boycotts, and sit-ins.

The crucial issue, then, ought not be whether expressive communication may be permitted, but rather why and when expression of ideas, whatever the form, may be prohibited under the First Amendment guarantees. Clearly, all expression can not be immune from legislation, e.g., bombings, assassinations, kidnappings, and large scale distruction of property. Even those devious Indians who perpetrated the Boston Tea Party could not have expected protection of their expressive activities. On the other hand, "/F/reedom to differ," to quote Justice Jackson, "is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."[7]

Persecution for the expression of unpopular viewpoints will probably never be eliminated. Nevertheless, the courts do seek

specific tests to help the police and the courts to distinguish between lawful and unlawful expression of opinion. Some of these tests include the intent of the communicator, the rhetorical effectiveness of the communicator, and the clear and present danger of the act. Thus far, the courts' tests have not adequately specified what communication is protected and what goes beyond constitutional guarantees.

As previously mentioned, inherent in many cases dealing with freedom of expression is the question of intent. Communication theorists have been struggling with this intent issue for sometime without success. We know that no inherent meaning exists in words or acts, but that meaning is supplied by the perception of the encoders and decoders. In Street v. New York[8] the court declared that a defendant could not be convicted on alleged intent alone, for "The thought of man shall not be tried, for the Devil himself knoweth not the thought of man."[9] Regarding the question of the rhetorical effectiveness of a communicator, the capacity of a person to express his opinions is hardly a sufficient basis to grant or deny freedom of expression. Moreover, communication theorists have been struggling for decades over the criteria to determine what is successful speech.[10] There is also great difficulty discerning with precision whether or not expressive conduct is directed to inciting imminent lawless activity. First, vast perceptual differences exist about whether particular expressive activities heighten or reduce imminent illegal activity. Justice Jackson once wrote: [A] person gets from a symbol the meaning he

puts into it, and what is one man's comfort and inspiration is another's jest and scorn.[11] Second, it is difficult to demonstrate a direct cause-effect link between the expressor and his audience's behavior.

II

In this section, a communicative game theory is proposed to enhance insight for distinguishing between lawful and lawless communication. By using game theory, I do not wish to invoke the connotation of "trivia" which is usually associated to the word "game." I submit that the game image, if taken seriously, significantly highlights important variables and relationships which demand investigation. This approach is adapted from Lawrence Rosenfield's "A Game Model of Human Communication."[12]

This model consists of three concepts which one must distinguish among: a rule, a tactic, and a custom. The function of a rule is primarily to regulate behavior. Citizens as well as institutions are controlled by the limits that an authority sets as to the range of permissible behavior. Violation of the prohibitions can result in the authority imposing sanctions. Thus, basketball rules limit a team to five players. Should one team in the course of play violate the boundary conditions by permitting a sixth man on the court, we expect the referee to enforce the rule by invoking the appropriate penalty. In society there are laws which prohibit us from looting, arson, destroying property, maliciously injuring others, etc.

In addition to establishing limits censor-fashion, rules can also operate as a system to define the behavior which constitutes a game. For example, in football when a ball carrier for one team crosses the other team's goal line, the player's team is awarded six points and the opportunity to try for a seventh or eighth point. And that explains what a touchdown is. Rules also distinguish one game from another.

Rules possess several qualities:

1. Rules are often arbitrary rather than natural. For instance, why must a basketball game consist of four periods instead of six? Why should a person be prohibited from wearing a United States flag on their clothing?
2. Although rules are subject to change, they usually remain static for the duration of the activity.
3. Rules are the formal pre-conditions of a game.
4. Rules ordinarily prohibit likely infractions, but rules are seldom exhaustive or precise. But rules in communication games or legal situations are at best indeterminate, rather more like the rules for a snowball fight than for a football match.[13]

If this analogy holds, communication theorists are unlikely to find much insight into human behavior if they focus too much on the rule systems per se. Tactics are the behavior patterns which conform to the rules and at the same time seem to be a viable means for satisfactorily terminating the game. It is the nature of a game or persuasive communication to reach toward a cessation point. Within the rule bounded area, exists room for many possible behaviors. Hence, football teams may use the T-formation or the I-formation.

They may also use a passing or running game supplemented by an outstanding field goal kicker. In a rhetorical sense, the tactical component of a game corresponds to the performative character of communication. Dissenters may choose to test a law's constitutionality or they may wish to work within the rules to create newsworthy activities in order to present their ideas to a larger audience in a dramatic manner.

Customs are patterns of behavior which over time assume the status of conventions, norms or tradition, but customs are non-essential to the game. Cheer leaders, pep clubs, mascots, marching bands, huddles and fireworks on the Fourth of July are examples of customs. One can still play the game without these elements. Customs derive their justification from tradition, whereas rules are determined by authority and tactics are teleological and are shaped by experience.

One of the problems in human communication situations is that we confuse one of the three concepts of the game model with another, especially customs with rules. A recent example of this occurred in an Iowa college wrestling match where one team refused to wrestle another team because the other team used "mat-girls." Mat-girls serve a function similar to cheer leaders and water-girls. Hence, one school forfeited several matches because they disagreed with non-essential procedures (starting of a tradition).

Likewise, do the courts and society confuse customs with laws? On more than one occasion the courts had to decide whether the pledge of allegiance to the flag should be compulsory (a rule) or optional (a custom). On one occasion the court found that flag saluting was a non-essential ritual, while in another similar case flag saluting

was demanded before a person could speak in a public meeting.[14] There are scores of other cases where jurors confused customs with laws and denied First Amendment protection to the words and behavior of dissenters and the courts later overturned the decisions reached by the layman.[15]

Some legislators have passed laws against activities which seem to be analogous to customs, e.g., flag burning, draft card burning, flying the flag upside down, and using a flag as an art display o as clothing.

First Amendment guarantees for symbolic tactics which may endanger life or destroy property such as the throwing of paint and blood, some sit-ins and take overs will be significantly restricted just as speeches which call for riots or assassinations are restricted. First Amendment guarantees for symbolic tactics which may result in interference with normal functioning at that particular time and place will probably be evaluated on an individual basis until more objective procedures are developed to distinguish between tactics and rules. Kalven refers to stand-ins, dramas, etc. as "structured ceremonials of protest" rather than riots.[16]

It would be foolhardy to suggest that the game model is a panacea for ensuring freedom of expression, for difficult judgments regarding permissible expression will remain necessary. The game model will hopefully provide a unique, flexible perspective from which to analyze a large variety of human communication situations. The importance of the decisions from these situations is highlighted by Justice Fortas' words: "In the United States, under our

Constitution, the question is not 'may I dissent?' or 'may I oppose a law or a government?' I may dissent. I may criticize. I may oppose. Our Constitution and our courts guarantee this. The question is: 'How may I do so?'" [17]

Footnotes

1. "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Constitution. Amendment I.

2. Hague v. CIO, 307 U.S. 496 (1939); Gitlow v. New York, 268 U.S. 652 (1925).

3. Schacht v. United States, 398 U.S. 58 (1970); Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1969); Stromberg v. California, 283 U.S. 359 (1931).

4. Cox v. Louisiana, 379 U.S. 536, 555 (1965). See also "of Shadows and Substance: Freedom of Speech, Expression, and Action," Wisconsin Law Review (1971), 1209.

5. Harry Kalven, Jr., The Negro and the First Amendment (Phoenix Books, 1969), p. 201; also see "Symbolic Conduct," Columbia Law Review, 68 (June 1968), 1125-1126.

6. Ted Finman and Stewart Macaulay, "Freedom to Dissent: The Vietnam Protests and the Words of Public Officials," Wisconsin Law Review (1966), 632; Ibid., "Symbolic Conduct."

7. West Virginia Bd. of Educa. v. Barnett, 319 U.S. 624, 642 (1943).

8. Street v. New York, 394 U.S. 576 (1969).

9. Federal Riot Act and the First Amendment," Harvard Law Review, 5 (April 1970), 393.

10. William Norwood Brigance, "What is Successful Speech?" Quarterly Journal of Speech Education, 11 (November 1925), 373.

11. See note 4, Supra.

12. Lawrence W. Rosenfield, "A Game Model of Human Communication," What Rhetoric (Communication Theory) Is Appropriate for Contemporary Speech Communication? (University of Minnesota, 1968), p. 26-41.

13. D. Pole, The Later Philosophy of Wittgenstein (London, 1958).

14. New York Times, September 9, 1970, p. 6; West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

15. Haig A. Bosmajian, Dissent: Symbolic Behavior and Rhetorical Strategies (Allyn and Bacon, 1972), p. 10.

16. Kalven, pp. 178-179.

17. Abe Fortas, Concerning Dissent and Civil Disobedience (Signet Book, 1968), p. 19.